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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1483

TEAMSTERS UNION LOCAL 377,
Petitioner,

v.

WILLIAM SCOTT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF WILLIAM SCOTT IN OPPOSITION

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ARGUMENT

I. This Court Previously Rejected a Petition From the Union Seeking to Review the Very Same Issue.

In 1974, the Sixth Circuit ruled that attorney's fees were "a major element of the damages incurred by Scott" and that he was entitled to a hearing to prove damages, including attorney's fees, incurred "as a result of the union's breach of fair representation" *Scott* v. *Anchor et al.*, 496 F2 276 (CA 6 1974). The union then filed a petition for certiorari to this Court and argued that the

Sixth Circuit erred and that attorneys' fees were *not* properly includable as part of damages. This Court rejected the union's argument and denied cert. in Nov. 1974 (419 US 997).

Now the union seeks to raise the issue all over again.

Nothing in the union's brief requires this Court to reverse its previous decision.

II. There Has Been No Final Appealable Order Concerning Attorney's Fees and the Petition is Premature.

The Sixth Circuit for the second time has remanded this case for hearing on the damage issue. Although the "liability" issue has been resolved, the trial court has not yet determined the amount of attorney's fees due as expenses in collecting damages from the employer. The union objects that the amount of Plaintiff's *claim* is excessive. However, the trial court has not yet ruled on its method of determining damages and has not yet fixed the amount of fees to be chargeable to the union.

Under normal appellate rules, the question of damages and attorney fees can not be raised on appeal until there is a final judgment. The rule makes sense, because many of the union's arguments will not become focused or relevant until the trial court resolves the issues and enters judgment. Since there is no final appealable judgment, the union's petition is premature.

III. The Decision of the Sixth Circuit Is in Conformity with the Decisions of this Court and Other Courts that Have Considered the Issue.

The decision of the Sixth Circuit is that the union is liable for what,

> "it cost him [Scott] in attorney fees and other expenses to do that which the union was obliged but failed to do on his behalf . . . he was entitled to include in his damages against the union the amount which he reasonably expended in attorney fees and other costs in presenting his claim against the company, which would not have been incurred but for the union's breach of its duty to represent him fairly and in good faith."

The decision follows the *Czosek* v. *O'Mara* case, 397 US 25 (1970), which outlined the union's responsibility to pay for the "expenses of collection from the employer" (id. at p. 29).

The theory underlying the rule was well expressed in the *De Arroyo* case where the Court noted:

> "The cost of attorney fees is an injury to the employee directly attributable to and necessitated by the failure of the union . . . to utilize the contractual grievance procedures . . . ."
> *De Arroyo* v. *Sindicato,* 425 F2 281 (CA 1 1970)

The lower courts have been unanimous in ruling that attorney's fees were the responsibility of the union in an unfair representation case. *Rolax* v. *Atlantic Coast Line Railway,* 182 F.2d 473 (4th Cir. 1951); *Tischler* v. *Airline Pilots Assoc.,* 59 CCH Lab. Cas. 13,246 (5th Cir. 1958); *Local 4706* v. *Steelworkers Union,* 338 F.2d 1154 (W. D. Pa. 1972); *NLRB* v. *Local Union 396,* 76 CCH Lab Cas.

10,693 (9th Cir. 1975); *Holodnak* v. *Avco,* 76 CCH Lab. Cas. 10,676 (2d Cir. 1975); *NLRB* v. *Local 485 IUE,* 67 CCH Lab. Cas. 12,371 (2d Cir. 1972); *Harrison* v. *United Transportation Union,* 530 F2 558 4th Cir. 1975.

These cases and *Czosek* are an outgrowth of this Court's ruling in *Vaca* v. *Sipes,* 386 US 171 (1967), that "increases if any in these damages caused by the union's refusal to process" should be chargeable to the union.

The rule is in line with the common law doctrine that a tortfeasor must pay attorney's fees as part of damages to the injured Plaintiff who, as a result of the tort, his been required to hire a lawyer to sue a third person. 22 *Am Jur* Damages 166 (1965); 45 ALR2 1183 (1956).

IV. The Aleyska Doctrine Is Inapplicable to the Case at Bar.

In the *Aleyska* case this Court held that attorney's fees are not recoverable in equity under the "private attorney general theory" *Aleyska Pipeline Service Company* v. *Wilderness Society,* 421 US 240 (1975). There is nothing in *Aleyska* to indicate any retreat from the doctrine that has been created to protect victims of unfair representation. Scott filed this lawsuit against the union for his private benefit and not to vindicate any public policy. In this case, in order to recover damages from his employer, Anchor, he was required to hire a lawyer, file suit against the employer, go through a long trial, and defend his judgment against the employer in various appeals. The legal fees in collecting judgment against Anchor were proximately caused by the union's failure to represent. *Scott seeks ordinary consequential damages — a matter not even remotely related to the "private attorney general theory."*

In addition, Scott also could recover, as a matter of equity, under the "bad faith" and "common benefit" exceptions to *Aleyska. Hall* v. *Cole,* 412 US 1 (1973); *Vaughan* v. *Atkinson,* 369 US 527 (1962); *Mill* v. *Electric Auto Lite,* 396 US 375 (1970); Vol. 89 *Harvard Law Review* 181, 182 (1975); *Brennan* v. *United Steelworkers Union,* 81 LC 13,182 (CA 3 1977).

However, the Sixth Circuit in its decision relied on the damage theory rather than one of the exceptions to *Aleyska,* which is a further reason why its decision raises no conflict with any other circuit.

CONCLUSION

This Court has previously rejected the union's arguments. The rule permitting a victim of unfair representation to recover attorney's fees expended in his suit against the employer as part of damages is now well settled and is founded on good reason and policy. The *Aleyska* case, involving a question of *equity,* has no bearing on the issue of *law* concerning damages. In addition, questions relating to damages are not ordinarily appealable until after there has been a final judgment.

For all these reasons, the petition presents no good reason for this Court to review the judgment below.

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